IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 292

MISSOURI PACIFIC RAILROAD COMPANY, *Petitioner*

v.

ELMORE & STAHL, *Respondent*

BRIEF OF ASSOCIATION OF AMERICAN RAILROADS AS AMICUS CURIAE IN SUPPORT OF PETITION FOR REHEARING

GREGORY S. PRINCE
WILLIAM M. MOLONEY
929 Transportation Building
Washington 6, D. C.
Counsel for the Association of American Railroads, Amicus Curiae

Of Counsel:

WILLIAM F. ZINGER
1138 Transportation Center
Philadelphia 4, Pa.

J. EDGAR MCDONALD
466 Lexington Avenue
New York 17, N. Y.

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The Association of American Railroads hereby files its Brief as *amicus curiae* in this case, pursuant to Rule 42(2) of the Rules of the Supreme Court. The Brief is accompanied by written consent to its filing from the Missouri Pacific Railroad Company and Elmore & Stahl. These are all of the parties in the case.

I. INTEREST OF AMICUS CURIAE

The interest of the Association of American Railroads as *amicus curiae* is set forth on pages 1 through 3 of its Brief in Support of Petitioner on certiorari. Leave to incorporate herein by reference that statement of interest is respectfully requested.

II. ARGUMENT

The Court's Erroneous Construction of § 20(11).

The Court's interpretation of the shipping contract was influenced by its erroneous construction of § 20(11) of the Interstate Commerce Act, 49 U.S.C. § 20(11), as making unlawful and void any contract modifying or affecting the standard of liability imposed by common law upon a carrier. That the common law permitted a carrier's liability, except for negligence, to be modified or affected by a valid contract is beyond dispute. The Court's decision, however, construes § 20(11) as having abolished this right of contract recognized by the common law. Such a construction of the statute is diametrically opposed to that made by this Court in *Adams Express Company v. Croninger*, 226 U.S. 491 (1913), pages 506, 507, 509, 511. This Court there stated that, at common law, the rigor of liability might be modified through any fair, reasonable and just agreement with the shipper which did not include exemption against the negligence of the carrier or his servants (page 509). Referring to the Carmack amendment, the Court stated that the statutory liability, aside from responsibility for the default of a connecting carrier, was not beyond the liability imposed by the common law as that body of law had been interpreted. With respect to the right to contract, the Court found the statute simply imposed the common law prohibition against a contract relieving the carrier of liability for its own negligence:

> The statutory liability, aside from responsibility for the default of a connecting carrier in the route, is not beyond the liability imposed by the common law as that body of law applicable to carriers has been interpreted by this court as well as

> many courts of the States. *Greenwald v. Barrett*, 199 N.Y. 170, 175; *Bernard v. Adams Express Co.*, 205 Massachusetts 254, 259. *The exemption forbidden* is, as stated in the case last cited, "a statutory declaration that a contract of exemption from liability for negligence is against public policy and void." This is no more than this court, as well as other courts administering the same general common law, have many times declared. (page 511) (emphasis supplied)

In the subsequent decision in *Missouri, Kansas & Texas Railway Company v. Harriman*, 227 U.S. 657 (1913), this Court construed the statute and its limitation upon the right of contract as follows:

> The liability imposed by the statute is the liability imposed by the common law upon a common carrier, and may be limited or qualified by special contract with the shipper, provided the limitation or qualification be just and reasonable, and does not exempt from loss or responsibility due to negligence. (page 672)

The way in which this Court's construction of the statute influenced its interpretation of the shipping contract is ably presented in the Petition for Rehearing and we join in the presentation there made.[1] Not only was the

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[1] In a footnote in the Petition for Rehearing the Court's attachment of significance to the fact that the same bill of lading is used for shipment of both perishable and non-perishable commodities is challenged upon sound grounds. That a separate bill of lading for perishables was unnecessary, since ". . . the conditions of the merchandise bill, *supplemented by provisions which are more appropriate to tariffs than to bills of lading*, will be entirely sufficient to take care of the transportation of perishable traffic" was explained in brief in *The Matter of Bills of Lading*, 52 I.C.C. 671. (Brief on Behalf of Carriers, page 8)

Court let to an erroneous and utterly meaningless interpretation of Rules 130 and 135 of the Perishable Protective Tariff, but it also nullified the very clear provisions of the Uniform Freight Classification providing for alternate rates depending upon the liability undertaken by the carrier. (cf. *Illinois Steel Co. v. Baltimore & Ohio Railroad Co.* 320 U.S. 508 [1944].) If, as the Court held, the carrier's liability must always be that imposed by the common law and can not be modified or affected by any provisions in the shipping contract, then we are at a loss to understand just what carrier liability the shipper would be purchasing if he elected to pay the higher rate provided in the classification.

The Court's decision that no contract can relieve a common carrier of liability for damage not caused by one of the enumerated exceptions recognized by common law is entirely contrary to the great weight of authority. (13 C.J.S. § 98; 20 A.L.R. 262, et seq.; 28 A.L.R. 503, et seq.; 45 A.L.R. 919, et seq.)

The Carrier's Burden of Proof

This Court's statement (Opinion, page 4) that the carrier, in order to overcome a shipper's *prima facie* case, has the burden of showing *both* its freedom from negligence and that the damage is due to an excepted cause relieving the carrier of liability, will be construed, in all likelihood, as overruling numerous prior decisions of the Court and was unnecessary to disposition of this case.[2] Prior decisions of this Court held

[2] In this case the carrier proved and the jury found the carrier had followed the shipper's instructions and had not been negligent. (TR. 177)

clearly that when a carrier, in answer to a *prima facie* case, established that the immediate cause of the damage was one excepted by common law or by contract, the burden rested upon the shipper to prove negligence or fault on the part of the carrier. Some of those decisions, which seemingly are overruled, are actually cited in support of the Court's present ruling. It is such citation that leads us to believe the Court failed to realize the full significance of its ruling.

The case of *Schnell v. The Vallescura,* 293 U.S. 296 (1934), is cited and quoted. This Court there stated that when a carrier has sustained the burden of showing that the *immediate* cause of the loss or injury is an excepted cause, the burden is then on the shipper to give evidence of the carrier's negligence, citing numerous prior decisions of this Court (pages 304-305). Even more pertinent to the case at bar is the Court's explanation of the burden of proof resting upon the carrier where the cargo is damaged by causes unknown or unexplained. In the case at bar the Court pointed out "it is apparent that the jury was unable to determine the cause of the damage to the melons" (Opinion, page 4). In other words, the melons were damaged by causes unknown or unexplained. In such a situation this Court took pains, in the *Vallescura* case, to explain the burden of proof as follows:

> If he delivers a cargo damaged by causes unknown or unexplained, which had been received in good condition, he is subject to the rule applicable to all bailees, that such evidence makes out a *prima facie* case of liability. It [the *prima facie* case] is sufficient, if the carrier fails to show that the damage is from an excepted cause, to cast on him the further burden of showing that the damage is not due to

> failure properly to stow or care for the cargo during the voyage. (page 305)

Thus, only where the carrier *failed* to show that the damage was from an excepted cause did the *prima facie* case impose the burden of showing that the damage was not due to its negligence. Conversely, a showing that the immediate cause of the damage was one excepted by common law or contract relieved the carrier, in its answer to the *prima facie* case, of the further burden of showing that the damage was not due to its negligence.

The case of *Galveston, H. & S. A. Ry. Co. v. Wallace*, 223 U.S. 481 (1912), is cited. In that case the shipper had established a *prima facie* case by showing delivery of his goods to the carrier and the carrier's failure to deliver at destination. This Court explained the burden of proof resting upon the carrier as follows:

> The burden of proof that the loss resulted from some cause for which the initial carrier was not responsible in law or by contract was then cast upon the carrier. . . . If the failure to deliver was due to the act of God, the public enemy or some cause against which it might lawfully contract, it was for the carrier to bring itself within such exception. (page 492)

Implicit in this language is recognition that if the carrier had shown that the loss resulted from a cause excepted by law or contract the shipper's *prima facie* case would have been overcome.

We do not believe it was intended to overrule these and numerous like decisions of this Court. So well established was this rule with respect to the burden of proof that the Court of Appeals, 3rd Circuit, in 1948,

characterized as a "novel proposition" the argument that a carrier, in order to overcome a *prima facie* case, must prove both its exercise of due care and that the damage arose from an excepted cause. *The Monte Iciar*, 167 F. 2d 334 (1948), at page 337.

The breadth of the ruling is unnecessary in disposing of the conflict between the opinion of the Supreme Court of Texas in this case and the opinion of the United States Court of Appeals for the 9th Circuit in *Larry's Sandwiches, Inc. v. Pacific Electric Railway Co.*, 318 F. 2d 690 (1963). The conflict between the two opinions lay in the Court of Appeals' view that having established its freedom from negligence and compliance with the shipper's instructions, the carrier need not prove an excepted cause, while the Supreme Court of Texas was of the view that unless an excepted cause is established the question of the carrier's negligence is immaterial. Neither of the opinions dealt specifically with the burden of proof on the question of negligence when the damage is shown to have resulted from an excepted cause.

The previous decisions of this Court, that, in answer to a *prima facie* case, where the carrier has established an excepted cause, the carrier does not have the additional burden of establishing its freedom from negligence, should remain controlling and should not be overruled by this Court in its resolution of the conflict between the opinions referred to.

Possible Effect of the Opinion On Matters Not In Issue

In light of its interpretation of the particular shipping contract here involved, the breadth of the Court's construction of § 20(11) of the Interstate Commerce

Act is unnecessary to disposition of this case. Its construction of the statute is such as to affect vitally the rights and obligations of carriers and shippers in matters and areas not in issue in this case. For instance, the Uniform Domestic Bill of Lading, a part of the record in this proceeding, provides that the carrier shall not be liable for country damage to cotton or for damage or loss resulting from riots or strikes. We doubt that damage resulting from any of these would be considered damage caused by the act of God, the public enemy, the act of the shipper himself, public authority, or inherent vice or nature of the goods. (See citations, *infra.*) Nevertheless, the Court now says that the carrier is liable for any loss or damage which the carrier cannot show to fall within the exceptions enumerated by the Court as being recognized by the common law. Further, the Court says that no valid contract can be made that would relieve the carrier of this common law liability, that is, liability for any loss or damage not shown to have been caused by the particularly enumerated exceptions.

Thus, the contractual provision of non-liability for loss or damage resulting from riots or strikes may be made questionable by the Court's opinion because not falling within the enumerated exceptions recognized by the common law.

Shipping contracts providing that a common carrier shall not be liable for damage resulting from numerous causes, other than its own negligence, not falling within the enumerated common law exceptions have been held valid, both at common law and under § 20(11) of the Interstate Commerce Act. *Jonesboro, Lake City & Eastern Railroad v. Maddy,* 147 Ark. 484; 248 S.W. 911 (1923) [damage resulting from strike]; *Southern*

Railroad Co. v. Barbee & Co., 190 Ky. 63; 226 S.W. 376 (1920) [damage resulting from riot and fire]; *American Fruit Distributors v. Hines*, 55 Cal. App. 377; 203 Pac. 821 (1921); 13 C.J.S. § 98; 20 A.L.R. 262, et seq.; 28 A.L.R. 503, et seq.; 45 A.L.R. 919, et seq.

Perhaps the language of the last paragraph of the footnote on page 8 of the Court's opinion is intended to preserve the lawfulness and validity of contractual provisions such as those to which we have referred. But a reading of the entire footnote, together with the body of the Court's opinion, raises questions whether in the area of carrier liability there has been preserved any measure of the contractual right recognized at common law.

CONCLUSION

For the foregoing reasons, it is respectfully urged that the Petition for Rehearing be granted.

Respectfully submitted.

GREGORY S. PRINCE
WILLIAM M. MOLONEY
929 Transportation Building
Washington 6, D. C.
Counsel for the Association of American Railroads, Amicus Curiae

Of Counsel:

WILLIAM F. ZINGER
1138 Transportation Center
Philadelphia 4, Pa.

J. EDGAR MCDONALD
466 Lexington Avenue
New York 17, N. Y.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing brief has this day been served on each party to this case by mailing copies thereof to the respective counsel of record at their post office addresses, first-class mail, postage prepaid.

WILLIAM M. MOLONEY
929 Transportation Building
Washington 6, D. C.
Counsel for the Association of American Railroads, Amicus Curiae

May 29, 1964.